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CBNSF  
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10/2/06

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

10-2006-0304

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
ZIDELL MARINE CORPORATION,  
Defendant.

CIVIL ACTION NO.  
C06-5037RJB  
CONSENT DECREE  
HYLEBOS WATERWAY  
PROBLEM AREAS

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CONSENT DECREE  
Commencement Bay Nearshore/Tideflats  
Superfund Site

USEPA SF



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United States Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
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Washington, D.C. 20044-7611

CBNSF (Zidell), 10/10/06

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A. BACKGROUND

1. As a result of the release or threatened release of hazardous substances at or from the Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce County, Washington ("CB/NT Site"), the U.S. Environmental Protection Agency ("EPA") and other governmental and private entities have undertaken response actions at or in connection with the CB/NT Site under Section 104 and Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9604 and 9606, and will undertake response actions in the future. In performing these response actions, EPA and other governmental and private entities have incurred and will continue to incur Response Costs at or in connection with the CB/NT Site.

2. On September 8, 1983, EPA placed the CB/NT Site on the National Priorities List pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

3. Under a Cooperative Agreement with EPA, the Washington Department of Ecology (Ecology) conducted a Remedial Investigation and Feasibility Study (RI/FS) of the CB/NT Site. Within the Tideflats area of the CB/NT Site, the RI/FS evaluated the nature and extent of contamination in the Sitcum, Blair, Milwaukee, Hylebos, St. Paul, Middle, Thea Foss (formerly known as City), and Wheeler-Osgood Waterways. Pursuant to Section 117 of

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1 CERCLA, 42 U.S.C. § 9617, EPA published notice of completion of the Feasibility Study and of  
2 the proposed plan for remedial action for the CB/NT Site in February 1989.

3 4. Because of the complexity of the CB/NT Site, Superfund response actions at the  
4 CB/NT Site are currently coordinated under seven operable units managed primarily by EPA and  
5 Ecology, including: (1) Operable Unit 01 - CB/NT Sediments; (2) Operable Unit 02 - ASARCO  
6 Tacoma Smelter; (3) Operable Unit 03 - Tacoma Tar Pits; (4) Operable Unit 04 - ASARCO Off-  
7 Property; (5) Operable Unit 05 - CB/NT Sources; (6) Operable Unit 06 - ASARCO Sediments;  
8 and (7) Operable Unit 07 - ASARCO demolition.

9 5. On September 30, 1989, EPA issued a Record of Decision (ROD) that selected  
10 the remedy for remediation of sediments, OU1, and sources of contamination, OU5. The ROD  
11 identified eight (8) problem areas within OU1 that required sediment cleanup. The eight  
12 problem areas were the Head and Mouth of the Hylebos Waterway, Sitcum Waterway, St. Paul  
13 Waterway, Middle Waterway, Head and Mouth of the Thea Foss Waterway (formerly City  
14 Waterway), and Wheeler-Osgood Waterway. Notice of the final plan was published in  
15 accordance with Section 117(b) of CERCLA.

16 6. EPA determined in the ROD that there were five major elements of the selected  
17 remedy for the CB/NT Site sediments and sources that will be applied, as appropriate, to each  
18 problem area:

19 7. Site Use Restrictions - To protect human health by limiting access to edible  
20 resources prior to and during implementation of source and sediment remedial activities.

21 8. Source Control - To be implemented to prevent recontamination of sediments.

22 9. Natural Recovery - Included as a preferred remediation strategy for marginally  
23 contaminated sediments that are predicted to achieve acceptable sediment quality through either  
24 biodegradation, or burial and mixing with naturally accumulating clean sediments within a ten  
25 (10) year period.

1           10.     Sediment Remedial Action - To address sediments containing contamination that  
2 is not expected to naturally recover within 10 years. The ROD required active sediment cleanup  
3 using one of the following four technologies: in-place capping, dredging and confined aquatic  
4 disposal, dredging and nearshore disposal, or dredging and upland disposal. The disposal option  
5 is to be identified during design of the remedial action.

6           11.     Source and Sediment Monitoring - To refine cleanup volume estimates,  
7 characterize the effectiveness of source controls, and implement long-term monitoring of the  
8 remedial action(s) to ensure long-term protectiveness of the remedy.

9           12.     Under a State Cooperative Agreement, EPA and the Washington Department of  
10 Ecology agreed that Ecology would implement OU5 source control actions using state law  
11 authorities and EPA would stay in the lead for implementing the sediment cleanup, OU1.

12           13.     This Consent Decree involves settlement of claims for recovery of Response  
13 Costs associated with the Mouth and Head of the Hylebos Waterway Problem Areas. The ROD  
14 determined that natural recovery will not sufficiently reduce contaminant concentrations in some  
15 areas of the Mouth and Head of the Hylebos Waterway within the ten (10) year period, so the  
16 ROD required active sediment cleanup with one (1) of the four (4) technology options of the  
17 remedy.

18           14.     On November 29, 1993, six entities (collectively known as the Hylebos Cleanup  
19 Committee or "HCC") entered into an Administrative Order on Consent ("HCC AOC") with  
20 EPA for the preparation of, performance of, and reimbursement of oversight costs for Pre-  
21 remedial Design Activities for the Hylebos Waterway Problem Areas. The objectives of the  
22 HCC AOC were: (1) to perform pre-remedial design work for the Hylebos Waterway consistent  
23 with the ROD; (2) to perform analyses and studies needed by EPA to select a Remediation Plan,  
24 including an acceptable confined disposal site and any necessary mitigation which attains  
25 Sediment Quality Objectives identified in the ROD, and all applicable or relevant and  
appropriate requirements; and (3) provide for recovery by EPA of its response and oversight

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1 costs incurred with respect to the implementation of this Order. By letter dated November 8,  
2 2001, EPA confirmed that all activities required by the HCC Order were performed, except  
3 remaining oversight billings, in accordance with Section XXVI of the HCC Order.

4 15. On August 3, 2000, EPA issued an Explanation of Significant Differences (ESD),  
5 in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action  
6 that significantly change, but do not fundamentally alter, the remedy selected in the ROD. The  
7 ESD addressed cleanup plans for two waterways within the CB/NT Site, selected disposal sites  
8 for all remaining contaminated sediment to be dredged and confined from the CB/NT Site,  
9 provided additional performance standards, and documented other differences from the ROD.  
10 Based on the studies and analysis conducted under the HCC AOC with respect to the Hylebos  
11 Waterway, the ESD provides details for: the cleanup of the areal extent of sediment  
12 contamination in the Hylebos Waterway and the estimated volume of sediment that requires  
13 remediation; designation of areas that are projected to naturally recover within 10 years of  
14 remedial action; EPA's decision to dispose of contaminated sediments in Blair Slip 1 and an  
15 upland regional landfill; performance standards for mitigation for the Remedial Action; and the  
16 estimated cost of the Remedial Action at the Hylebos Waterway. Notice and public comment  
17 were taken on the ESD and notice of the final ESD was published in accordance with Section  
18 117(c) of CERCLA.

19 16. Some of the potentially responsible parties entered into an allocation agreement  
20 which established a process by which a third-party, neutral allocator would determine shares of  
21 liability for all potentially responsible parties associated with the Hylebos Waterway Problem  
22 Areas. Settling Defendant did not participate in the allocation. The allocator's report, titled  
23 "Hylebos Waterway-Allocator's Final Cost Allocation Formula Report, dated May 22, 2000  
24 ("Allocator's Report"), assessed the Settling Defendant's share of Response Costs and formed a  
25 basis for this settlement. EPA independently reviewed the Allocator's Report and other pertinent

1 information, and, as to the Settling Defendant only, accepts the allocator's numerical allocation  
2 for purposes of this settlement.

3 17. Settling Defendant does not admit any liability arising out of the transactions or  
4 occurrences alleged to have occurred in connection with the Hylebos Waterway Problem Areas  
5 within the CB/NT Site

6 18. In a consent decree entered in the U.S. District Court for the Western District of  
7 Washington on May 28, 1997 in United States, et al. v. the City of Tacoma and the Tacoma  
8 Public Utility, Civil Action No. C97-5336 RJB, the City of Tacoma and Tacoma Public Utilities  
9 resolved their liability for damages for injury to natural resources under federal, state and tribal  
10 trusteeship resulting from the release of hazardous substances at the CB/NT Site.

11 19. In a consent decree entered in the U.S. District Court for the Western District of  
12 Washington on February 26, 2003 in United States v. Mary Jane Anderson, et al., Civil Action  
13 No. C03-5107-RBL, a number of potentially responsible parties identified at the Hylebos  
14 Waterway Problem Areas within the CB/NT Site resolved their liability for their share of  
15 investigative and remediation costs resulting from the release of hazardous substances at the  
16 Hylebos Waterway Problem Areas within the CB/NT Site.

17 20. In a consent decree entered in the U.S. District Court for the Western District of  
18 Washington on June 2, 2004 in United States v. Atofina Chemicals, Inc. and General Metals of  
19 Tacoma, Inc., Civil Action No. C04-5319-RBL, Atofina and General Metals agreed, *inter alia*, to  
20 conduct and finance the Remedial Design and Remedial Actions selected by EPA for the Head  
21 of the Hylebos Waterway Problem Area within the CB/NT Site.

22 21. The United States filed a complaint in this matter pursuant to Section 107 of the  
23 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §  
24 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be  
25 incurred for response actions taken at or in connection with the release or threatened release of  
hazardous substances at the Hylebos Waterway Problem Areas within the CB/NT Site. The

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1 Settling Defendant that has entered into this Consent Decree does not admit any liability to  
2 Plaintiff arising out of the transactions or occurrences alleged in the complaint.

3 22. The United States and Settling Defendant agree, and by entering this Consent  
4 Decree, this Court finds that settlement without further litigation and without the admission or  
5 adjudication of any issue of fact or law is in the public interest and is the most appropriate means  
6 of resolving this action with respect to Settling Defendant, and that this Consent Decree is fair,  
7 reasonable, and in the public interest.

8 THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED,  
9 ADJUDGED, and DECREED:

10 B. JURISDICTION

11 23. This Court has jurisdiction over the subject matter of this action pursuant to 28  
12 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction  
13 over Settling Defendant. Settling Defendant consents to and shall not challenge the terms of this  
14 Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

15 C. PARTIES BOUND

16 24. This Consent Decree is binding upon and inures to the benefit of the United States  
17 and the Settling Defendant and its heirs, successors and assigns. Any change in ownership or  
18 corporate or other legal status of Settling Defendant, including but not limited to, any transfer of  
19 assets or real or personal property shall in no way alter Settling Defendant's responsibilities  
20 under this Consent Decree. This Consent Decree does not bind any person or State agency that  
21 is not a party to it.

22 D. STATEMENT OF PURPOSE

23 25. By entering into this Consent Decree, the mutual objectives of the Parties are:

24 A. to reach a final settlement among the Parties pursuant to Section 122 of  
25 CERCLA, 42 U.S.C. § 9622, by allowing Settling Defendant to make a cash payment, including  
a 100 percent premium, to resolve its alleged civil liability under Sections 106 and 107 of

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1 CERCLA, 42 U.S.C. §§ 9606 and 9607 for injunctive relief with regard to the Hylebos  
2 Waterway Problem Areas, and for Response Costs incurred and to be incurred at or in  
3 connection with the Hylebos Waterway Problem Areas, and subject to the Reservation of Rights  
4 by the United States in Section J; and to resolve the claims of the Settling Defendant which have  
5 been or could have been asserted against the United States with regard to this Site as provided in  
6 this Consent Decree, thereby reducing litigation relating to the Hylebos Waterway Problem  
7 Areas;

8 B. to simplify any remaining administrative and judicial enforcement  
9 activities concerning the Hylebos Waterway Problem Areas by reducing the number of  
10 potentially responsible parties from further involvement at the Hylebos Waterway Problem  
11 Areas with respect to Response Costs; and

12 C. to obtain settlement with Settling Defendant for reimbursement of a  
13 portion of Response Costs incurred and to be incurred at or in connection with the Hylebos  
14 Waterway Problem Areas by the EPA Hazardous Substance Superfund and by private parties,  
15 and to provide for contribution protection for Settling Defendant with regard to the Response  
16 Costs, pursuant to Sections 113(f)(2) and 122 of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622,  
and as set forth in Paragraph 45 of this Consent Decree.

17 E. DEFINITIONS

18 26. Unless otherwise expressly provided herein, terms used in this Consent Decree  
19 that are defined in CERCLA or in regulations promulgated under CERCLA shall have the  
20 meaning assigned to them in the statute or regulations. Whenever the terms listed below are  
21 used in this Consent Decree, the following definitions shall apply:

22 A. "CERCLA" shall mean the Comprehensive Environmental Response,  
23 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

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1 B. "Consent Decree" or "Decree" shall mean this Consent Decree and all  
2 appendices attached hereto. In the event of conflict between this Consent Decree and any  
3 appendix, the Consent Decree shall control.

4 C. "Commencement Bay Nearshore/Tideflats Superfund Site" ("CB/NT  
5 Site") shall mean the entire Commencement Bay Nearshore/Tideflats Superfund Site and project  
6 area, including contaminated sediments and sources of contamination within the CB/NT Site,  
7 located in the City of Tacoma, Pierce County, Washington, and as defined in the CB/NT Record  
8 of Decision, dated September 30, 1989.

9 D. "Day" shall mean a calendar day. In computing any period of time under  
10 this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the  
11 period shall run until the close of business of the next working day.

12 E. "EPA" shall mean the United States Environmental Protection Agency  
13 and any successor departments, agencies, or instrumentalities.

14 F. "EPA Hazardous Substance Superfund" shall mean the Hazardous  
15 Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

16 G. "Hylebos Waterway Problem Areas" and/or "Site" shall mean all areas in  
17 which contaminated sediments are located, intertidal and subtidal, that require remedial action at  
18 and adjacent to the Mouth and the Head of the Hylebos Waterway, which are two of eight  
19 Problem Areas only within OU1 of the CB/NT Site. These Problem Areas are described in the  
20 CB/NT Site Record of Decision, dated September 30, 1989, and are more specifically delineated  
21 in the Figures 3A, 3B, and 3C in the August 3, 2000 ESD. These terms do not include Area  
22 5106 which is specifically designated in an Action Memorandum dated July 6, 2001, and  
23 property which is the subject of OU5, which encompasses upland properties adjacent to the  
24 Hylebos Waterway that are past, present or future sources of hazardous substances to the  
25 Hylebos Waterway Problem Areas.

1 H. "Hylebos Waterway Problem Areas Special Account" shall mean the  
2 special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42  
3 U.S.C. §9622(b)(3), and created by the Consent Decree entered in U.S. v. Bay Chemical  
4 Company, et al, C99-5521 (RJB), by the U.S. District Court for the Western District of  
5 Washington on June 23, 2000.

6 I. "Interest" shall mean interest at the current rate specified for interest on  
7 investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507,  
8 compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The  
9 applicable rate of interest shall be the rate in effect at the time the interest accrues.

10 J. "Paragraph" shall mean a portion of this Consent Decree identified by an  
11 Arabic numeral or an upper or lower case letter.

12 K. "Parties" shall mean the United States and the Settling Defendant.

13 L. "Section" shall mean a portion of this Consent Decree identified by a  
14 roman numeral.

15 M. "Settling Defendant" shall mean Zidell Marine Corporation.

16 N. "Record of Decision" or "ROD" shall mean the EPA Record of Decision  
17 relating to the Site signed on September 30, 1989, by the Regional Administrator, EPA Region  
18 10, all attachments thereto and incorporating all significant differences thereto documented in the  
19 ESD issued on July 28, 1997 and the ESD issued on August 3, 2000. The 2000 ESD may be  
20 referred to or discussed individually or separately from the 1989 ROD in this Consent Decree  
21 where appropriate.

22 O. "Response Costs" shall mean all costs of "response" as that term is  
23 defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), and incurred in connection to the  
24 Hylebos Waterway Problem Areas. Response Costs shall also include any CB/NT area-wide site  
25 costs billed to the CB/NT area-wide account that EPA may attribute or allocate to the Hylebos  
Waterway Problem Areas. Response Costs shall not include costs related to upland hazardous

1 waste cleanups and/or source control which were incurred by any entity. The phrase "past  
2 Response Costs" shall mean all costs incurred through September 30, 2001, including interest  
3 thereon. The phrase "future Response Cost" shall mean all Response Costs other than past  
4 Response Costs.

5 P. "United States" shall mean the United States of America, including all of  
6 its departments, agencies, and instrumentalities, which includes without limitation EPA and any  
7 federal natural resources trustee.

8 **F. PAYMENT**

9 27. Within forty-five (45) days of entry of this Consent Decree, Settling Defendant  
10 shall pay \$ 3,239,973.38 in payment for Response Costs. Payment shall be made by FedWire  
11 Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with  
12 current EFT procedures, referencing USAO File Number \_\_\_\_, EPA Site/Spill ID Numbers  
13 108N and 107C, and DOJ Case Number \_\_\_\_. Payment shall be made in accordance with  
14 instructions provided to the Settling Defendant by the Financial Litigation Unit of the United  
15 States Attorney's Office for the Western District of Washington following lodging of the  
16 Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern  
17 Time) will be credited on the next business day. The total amount to be paid by Settling  
18 Defendant pursuant to this paragraph shall be deposited in the Hylebos Waterway Problem Areas  
19 Special Account within the EPA Hazardous Substance Superfund to be retained and used to  
20 conduct or finance response actions at or in connection with the Hylebos Waterway Problem  
21 Areas, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

22 28. Settling Defendant's payment includes an amount for:

23 A. past Response Costs incurred at or in connection with the Hylebos  
24 Waterway Problem Areas; and

25 B. future Response Costs to be incurred at or in connection with the Site; and

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1 C. a one hundred percent (100%) premium to cover the risks and  
2 uncertainties associated with this settlement, including but not limited to, the risk that total  
3 Response Costs incurred or to be incurred in connection with the Hylebos Waterway Problem  
4 Areas, by any entity, will exceed the cost estimate for future Response Costs of \$56,056,407  
5 million or exceed the amount other PRPs can contribute.

6 29. At the time of payment under Paragraph 27 or, if applicable Paragraph 30 below,  
7 Settling Defendant shall send notice that such payment has been made to:

8 Chief, Environmental Enforcement Section  
9 United States Department of Justice  
10 DOJ No. \_\_\_\_\_  
P.O. Box 7611  
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11 Dean B. Ingemansen  
12 Assistant Regional Counsel  
13 Office of Regional Counsel  
United States Environmental Protection Agency, Region 10  
14 ORC-158, 1200 Sixth Avenue  
Seattle, Washington 98101

15 Jonathan Williams  
16 Remedial Project Coordinator  
United States Environmental Protection Agency, Region 10  
17 ECL-113, 1200 Sixth Avenue  
Seattle, Washington 98101

18 Diane Norton,  
19 Superfund Accountant, Finance Section  
United States Environmental Protection Agency, Region 10  
20 OMP-146, 1200 Sixth Avenue  
Seattle, Washington 98101

21 **G. FAILURE TO COMPLY WITH CONSENT DECREE**

22 30. A. If Settling Defendant fails to make full payment of its Total Payment  
23 Amount specified in Paragraph 27 within the time required by Paragraph 27, Interest shall begin  
24 to accrue on the effective date of this Consent Decree on Settling Defendant's unpaid balance  
25

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1 through the date of payment, and Settling Defendant shall pay stipulated penalties of \$1,000 per  
2 day for each day such payment is late.

3 B. Stipulated penalties are due and payable within 30 days of the date of the  
4 demand for payment of the penalties by EPA. All payments of stipulated penalties made under  
5 this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or  
6 cashier's check made payable to "EPA Hazardous Substance Superfund" and shall be deposited  
7 in the Hylebos Waterway Problem Areas Special Account within the EPA Hazardous Substance  
8 Superfund to be retained and used to conduct or finance the response action at or in connection  
9 with the Hylebos Waterway Problem Areas. After certification of completion of the Hylebos  
10 Waterway remedial action, any balance remaining in the Hylebos Waterway Problem Areas  
11 Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund. The  
12 check, or the letter accompanying the check, shall reference the name and address of the party  
13 making the payment, the Site name, the site/spill identification numbers 108N and 107C, and  
DOJ Case Number \_\_\_\_\_ and shall be sent to:

14 Mellon Bank  
15 EPA Region 10 Superfund  
16 P.O. Box 371099M  
Pittsburgh, PA 15251

17 31. If the United States brings an action to enforce this Consent Decree against  
18 Settling Defendant, Settling Defendant shall reimburse the United States for all costs of such  
19 action, including but not limited to costs of attorney time. Payments made under this Section  
20 shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling  
21 Defendant's failure to comply with the requirements of this Consent Decree. Notwithstanding  
22 any other provision of this Section, the United States may, in its unreviewable discretion, waive  
23 payment of any portion of the stipulated penalties that have accrued pursuant to this Consent  
24 Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as  
25 required by Section F or from performance of any other requirements of this Consent Decree.

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**H. CERTIFICATION OF SETTLING DEFENDANT**

32. By signing this Consent Decree, Settling Defendant certifies that, to the best of its knowledge and belief, it has:

A. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors, or agents, which relates in any way to identifying who owned, operated, or controlled the Site, or (2) to the ownership, possession, generation, treatment, transportation, storage, or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

B. no information that would suggest that its contributions of hazardous substances, pollutants, or contaminants to one or both of the Hylebos Waterway Problem Areas was greater than determined in the Allocator Report;

C. not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

D. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

33. The certifications contained in Paragraph 32 inure only to the benefit of the United States and the Settling Defendant, and not to any other parties.

**I. COVENANT NOT TO SUE BY UNITED STATES**

34. Covenant Not to Sue Settling Defendant by United States. In consideration of the payments and commitments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 35 and 36 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for Settling

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Defendant upon receipt by the Escrow Account from Settling Defendant of Settling Defendant's payments required by Section F (Payment) and any amount due under Section G (Failure to Comply with Consent Decree). These covenants are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree and the veracity of the information provided to EPA by Settling Defendant relating to Settling Defendant's involvement with the Hylebos Waterway Problem Areas. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

35. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, its right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant,

- A. to perform further response actions relating to the Site or
- B. to reimburse the United States for additional costs of response if, prior to

Certification of Completion of the Remedial Action:

- 1. conditions at the Site, previously unknown to EPA, are discovered, or
- 2. information, previously unknown to EPA, is received, in whole or in part, and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

36. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, its right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant,

- A. to perform further response actions relating to the Site or
- B. to reimburse the United States for additional costs of response if,

subsequent to Certification of Completion of the Remedial Action:

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1 1. conditions at the Site, previously unknown to EPA, are discovered, or  
2 2. information, previously unknown to EPA, is received, in whole or in  
3 part, and these previously unknown conditions or this information together with other relevant  
4 information indicate that the Remedial Action is not protective of human health or the  
5 environment.

6 37. For purposes of Paragraph 35, the information and the conditions known to EPA  
7 shall include only that information and those conditions known to EPA as of the date of the  
8 August, 2000 ESD (August 3, 2000) and set forth in the Record of Decision, as modified by the  
9 July 1997 and August 2000 ESD, and the administrative records supporting the Record of  
10 Decision and the ESD or contained in EPA-approved remedial design documents as of the  
11 effective date of this Consent Decree. For purposes of Paragraph 36, the information and the  
12 conditions known to EPA shall include only that information and those conditions known to EPA  
13 as of the date of Certification of Completion of the Remedial Action and set forth in the Record  
14 of Decision, the administrative records supporting the Record of Decision and July, 1997 and  
15 August, 2000 ESD, the post-ROD administrative record, or in any information received by EPA  
16 pursuant to the requirements of an Order or Consent Decree for Remedial Design and Remedial  
17 Action with other parties prior to Certification of Completion of the Remedial Action.

18 J. RESERVATIONS OF RIGHTS BY UNITED STATES

19 38. The covenant not to sue by the United States set forth in Paragraph 34 does not  
20 pertain to any claims other than those expressly specified in Paragraph 34, including but not  
21 limited to any civil or criminal claims under other statutes or under other Sections of CERCLA.  
22 The United States also reserves, and this Consent Decree is without prejudice to, all rights  
23 against Settling Defendant with respect to the following claims under Section 106 or 107 of  
24 CERCLA:  
25

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1           A.     liability for failure to meet a requirement of this Consent Decree,  
2 including, but not limited to payment of stipulated penalties or Interest pursuant to Section G of  
3 this Decree;

4           B.     liability arising from the past, present, or future disposal, release, or  
5 potential threat of a release of a hazardous substance, pollutant, or contaminant to areas outside  
6 of the Hylebos Waterway Problem Areas, including releases to upland properties adjacent to the  
7 Hylebos Waterway Problem Areas that have not migrated into the Hylebos Waterway Problem  
8 Areas as of the date this Consent Decree is lodged with the Court;

9           C.     criminal liability;

10          D.     liability for damages for injury to, destruction of, or loss of natural  
11 resources, and for the costs of any natural resource damage assessments within or outside of the  
12 Hylebos Waterway Problem Areas; and

13          E.     liability arising from the future release or potential threat of a release of a  
14 hazardous substance, pollutant, or contaminant at or in the Hylebos Waterway Problem Areas  
15 after the date of lodging of this Consent Decree.

16          39.    Notwithstanding any other provision in this Consent Decree, the United States  
17 reserves, and this Consent Decree is without prejudice to, the right to reopen or institute  
18 proceedings against Settling Defendant in this action or in a new action, to reimburse the United  
19 States for Response Costs, and/or to issue an administrative order to Settling Defendant seeking  
20 to compel Settling Defendant to perform response actions relating to the Hylebos Waterway  
21 Problem Areas, and/or to reimburse the United States for additional costs of response if:

22          A.     the United States finds that the Settling Defendant's Certifications made in  
23 Section H of this Decree are untrue or inaccurate in a material way; or

24          B.     information is discovered that indicates that Settling Defendant  
25 contributed hazardous substances to the Hylebos Waterway Problem Areas in such greater  
amount or such greater toxic or other hazardous effects that EPA determines that the discovered

1 information materially changes the basis for entering into this settlement with Settling  
2 Defendant.

3 40. Notwithstanding any other provision in this Consent Decree, the United States  
4 reserves, and this Consent Decree is without prejudice to, the right to institute proceedings  
5 against Settling Defendant in this action or in a new action to reimburse the United States for  
6 Response Costs, and/or to issue an administrative order to Settling Defendant seeking to compel  
7 Settling Defendant to perform response actions relating to any other Problem Area or portion of  
8 the CB/NT Site.

9 **K. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

10 41. Settling Defendant covenants not to sue and agree not to assert any claims or  
11 causes of action against the United States or its contractors or employees with respect to the  
12 remedial action at the Hylebos Waterway Problem Areas or this Consent Decree, including, but  
13 not limited to:

14 A. any direct or indirect claim for reimbursement from the EPA Hazardous  
15 Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C.  
16 §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

17 B. any claim against the United States arising out of response activities at the  
18 Hylebos Waterway Problem Areas, including any claim under the United States Constitution, the  
19 Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended,  
20 or at common law; or

21 C. any claim against the United States pursuant to Sections 107 and 113 of  
22 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Hylebos Waterway Problem Areas.

23 42. Nothing in this Consent Decree shall be deemed to constitute approval or  
24 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or  
25 40 C.F.R. Part 300.700(d).

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1                   L. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

2           43.     Nothing in this Consent Decree shall be construed to create any rights in, or grant  
3 any cause of action to, any person not a Party to this Consent Decree. The United States and  
4 Settling Defendant each reserve any and all rights (including, but not limited to, any right to  
5 contribution), defenses, claims, demands, and causes of action which each Party may have with  
6 respect to any matter, transaction, or occurrence relating in any way to the Hylebos Waterway  
7 Problem Areas or the CB/NT Site against any person not a party to this Consent Decree, except  
8 as provided below. If Settling Defendant seeks to bring a new action in connection with the  
9 Hylebos Waterway Problem Areas, excepting an action brought by Settling Defendant against its  
10 insurance carrier, Settling Defendant agrees to notify the United States at least sixty (60) days  
11 prior to the commencement of the action, and concurrently to provide to EPA all information in  
12 its possession relating to the person's involvement at the Hylebos Waterway Problem Areas.

13           44.     In any subsequent administrative or judicial proceeding initiated by the United  
14 States for injunctive relief, recovery of Response Costs, or other relief relating to the Hylebos  
15 Waterway Problem Areas, Settling Defendant shall not assert, and may not maintain, any defense  
16 or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion,  
17 claim-splitting, or other defenses based upon any contention that the claims raised in the  
18 subsequent proceeding were or should have been brought in the instant action; provided,  
19 however, that nothing in this Paragraph affects the enforceability of the covenant not to sue  
20 included in Paragraph 34.

21           45.     The Parties agree, and by entering this Consent Decree this Court finds, that  
22 Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from  
23 contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C.  
24 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this  
25 Consent Decree are all response actions taken and to be taken by the United States or by any  
other entity, and Response Costs incurred in connection with the Hylebos Waterway Problem

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1 Areas, including past and future Response Costs incurred and to be incurred by the United  
2 States, and past and future Response Costs incurred by any other entities in connection with the  
3 Hylebos Waterway Problem Areas. "Matters addressed" does not include any claims under  
4 contractual indemnities or any other private contractual obligations. The "matters addressed" in  
5 this Consent Decree do not include those response costs or response actions as to which the  
6 United States has reserved its rights under this Consent Decree (except for claims for failure to  
7 comply with this Decree), in the event that the United States asserts rights against Settling  
8 Defendant coming within the scope of such reservations.

9 **M. RETENTION OF JURISDICTION**

10 46. This Court shall retain jurisdiction over this matter for the purpose of interpreting  
11 and enforcing the terms of this Consent Decree.

12 **N. INTEGRATION**

13 47. This Consent Decree constitutes the final, complete, and exclusive agreement and  
14 understanding among the Parties with respect to the settlement embodied in this Consent Decree.  
15 The Parties acknowledge that there are no representations, agreements, or understandings  
16 relating to the settlement other than those expressly contained in this Consent Decree.

17 **O. PUBLIC COMMENT**

18 48. This Consent Decree shall be lodged with the Court for a period of not less than  
19 thirty (30) days for public notice and comment. The United States shall file with the Court any  
20 written comments received and the United States' response thereto. The United States reserves  
21 the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose  
22 facts or considerations that indicate that this Consent Decree is inappropriate, improper, or  
23 inadequate. Settling Defendant consents to entry of this Consent Decree without further notice,  
24 and the United States reserves the right to oppose an attempt by any person to intervene in this  
25 civil action.

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1 P. EFFECTIVE DATE

2 49. The effective date of this Consent Decree shall be the date of entry by this Court,  
3 following public comment pursuant to Paragraph 48.

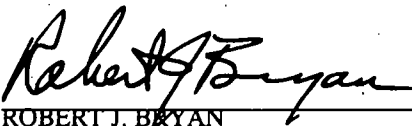
4 Q. SIGNATORIES/SERVICE

5 50. The undersigned representative of the Settling Defendant to this Consent Decree  
6 and the Assistant Attorney General for the Environment and Natural Resources Division of the  
7 United States Department of Justice, or her delegatee, certifies that he or she is fully authorized  
8 to enter into the terms and conditions of this Consent Decree and to execute and bind legally  
9 such party to this document.

10 51. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by  
11 this Court or to challenge any provision of this Consent Decree, unless the United States has  
12 notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

13 52. Settling Defendant shall identify, on the attached signature page, the name and  
14 address of an agent who is authorized to accept service of process by mail on its behalf with  
15 respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby  
16 agrees to accept service including, but not limited to, service of a summons, in that manner and  
17 to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil  
18 Procedure and any applicable local rules of this Court.

19 SO ORDERED THIS 2<sup>nd</sup> DAY OF OCTOBER, 2006.

20  
21   
22 ROBERT J. BRYAN

23 United States District Judge  
24  
25

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1  
2 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v.  
3 Zidell Marine Corporation, relating to the Hylebos Waterway Problem Areas, within the  
4 Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce County,  
5 Washington:

6  
7 **FOR THE UNITED STATES OF AMERICA**

8 Date: \_\_\_\_\_

9 s/  
10 BRUCE S. GELBER  
11 Section Chief  
12 Environmental and Natural Resources Division  
13 Environmental Enforcement Section  
14 U.S. Department of Justice  
15 Washington, D.C. 20530

16 Date: \_\_\_\_\_

17 s/  
18 MICHAEL J. MCNULTY  
19 Attorney  
20 Environmental Enforcement Section  
21 Environmental and Natural Resources Division  
22 United States Department of Justice  
23 P.O. Box 7611  
24 Washington, D.C. 20044  
25 (202) 514-1210

JOHN MCKAY  
United States Attorney for the  
Western District of Washington

BRIAN KIPNIS  
Assistant United States Attorney  
601 Union Street  
Suite 5100  
Seattle, WA 98101  
(206) 553-7970

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1  
2  
3 Date: \_\_\_\_\_

s/

DANIEL D. OPALSKI  
Director, Office of Environmental Cleanup  
Region 10  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, Washington 98101

4  
5  
6  
7  
8 Date: \_\_\_\_\_

s/

DEAN B. INGEMANSEN  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency  
1200 Sixth Avenue  
Seattle, Washington 98101

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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v.  
2 Zidell Marine Corporation, relating to the Hylebos Waterway Problem Areas within the  
Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce County,  
Washington:

3  
4 **FOR ZIDELL MARINE CORPORATION**

5  
6 Date: 11/8/2005 \_\_\_\_\_

7  
8 Agent Authorized to Accept Service on Behalf of Above-Signed Party:  
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